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BOOK REVIEW

FELIX FRANKFURTER: SCHOLAR ON THE BENCH. By Helen Shirley Thomas. Baltimore, Md.: The Johns Hopkins Press, 1960. Pp. 381. (\$6.50)

In a letter to Mr. Justice Holmes, Sir Frederic Pollock wrote: "It is pleasing to see that the learned Felix Frankfurter has written in your praise in the Harvard Law Review warmly but without being fulsome or tedious."¹ Two decades have since gone by and he who bestowed the praise is himself the recipient of a scholarly tribute that is warm and neither fulsome nor tedious.

The author, a member of the faculty of Goucher College, has not essayed a full-length biography of Justice Frankfurter, but, instead, has attempted an analysis of his legal philosophy as gleaned from his writings, judicial and extra-judicial.

The winds of controversy have swirled about the head of Justice Frankfurter for many years and it is inevitable that any book written about him by one not hostile to his views of the judicial function, would be somewhat of an apologia. Perhaps the greater portion of the criticism that has been directed at the Justice springs from the disappointment of those of liberal persuasion who had imagined that he would espouse their views when he was appointed to the Supreme Court by President Franklin D. Roosevelt.² The author correctly points out that this expectation had very little basis in fact; that "His philosophy precludes adoption of wholesale changes in the law."³

After a brief biographical sketch, the author discusses the Justice's opinions with occasional illumination derived from his other writings. Although her admiration for Justice Frankfurter is apparent all through the book, she does not hesitate to offer criticism where she thinks it necessary, nor does she fail to quote sources definitely opposed to the Justice's philosophy.

Under the heading of Symbolism and Social Unity, Frankfurter's emphasis on symbolism as a factor in the transmission of the continuing values of a civilization is disclosed and advanced as an explanation of his opinions in the Flag Salute Cases.⁴ His belief in the symbolic role of the

1. 2 HOLMES-POLLOCK LETTERS 213 (Howe ed. 1941).

2. For an unexpected view of the Justice's sentimentality and impish humor, read his own account of his appointment and how Senator Pat McCarran, a virulent opponent subsequently came to him for a favor. FELIX FRANKFURTER, REMINISCENCES 283, 287 (1960).

3. P. 39 of the book reviewed herein.

4. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-671 (1943) (dissent); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

Court as a protector of social interests and therefore not to be burdened with trivia is said to underly his opposition to the granting of certiorari in cases involving the Federal Employers Liability Act.

The difference within the Court as to the extent of the incorporation of the Bill of Rights into the Fourteenth Amendment is treated under the heading, The Uses of History. Although Frankfurter has referred to natural law as "not much more than a literary garniture" and "Not a guiding means for adjudication,"⁵ his insistence that only those "rights implicit in the concept of ordered liberty" be granted the sanctity of incorporation in the Fourteenth Amendment is a fair example of natural law thinking. The author suggests that this and other contradictions are the consequences of Frankfurter's use of history as a means of determining societal and personal values and his frontiers of legal thought. This position of extreme vulnerability is little more than a groping explanation for the phenomenon of inconsistency which seems to be one of the occupational hazards of judging.

In her discussion of *Dennis v. United States*,⁶ the author quotes John P. Frank's devastating comment on Frankfurter's concurring opinion.⁷ Whether or not the Communist threat provided sufficient justification for the contraction of the permissible area of freedom of speech will long be debated. That the Court itself entertained doubts is apparent from its holding in *Yates v. United States*,⁸ which modified the Dennis doctrine by requiring incitement rather than mere advocacy of the forcible overthrow of the government to constitute a crime under the Smith Act. Surprisingly, the *Yates* case is not discussed in the book.

Many pages are devoted to an exegesis of the "preferred-position" controversy between the advocates of judicial self-restraint on the Court led by Justice Frankfurter, and the "libertarian-activist" approach championed by Justices Black and Douglas. The so-called libertarian-activities would, in effect, erect a presumption of unconstitutionality with regard to legislation purporting to abridge the civil liberties embraced in the Bill of Rights.⁹ The view of Justice Frankfurter and his followers is that faith must be placed in the legislature and not in the judiciary to work out the accommodations between liberty and order.¹⁰

5. FRANKFURTER, JOHN MARSHALL IN GOVERNMENT UNDER LAW 15, 16 (1956).

6. 341 U.S. 494 (1951).

7. "This opinion is the very epitome of intellectual liberalism at its most ineffective." Frank, *The United States Supreme Court: 1950-51*, 19 U. CHI. L. REV. 165, 187 (1952).

8. 354 U.S. 298 (1957).

9. See Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960) and for a recital of the attempts to constitutionally limit the Court, see Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597 (1958).

10. It would give one small comfort to be deprived of civil rights in the interests of a concept called "judicial self restraint." One is reminded of Baron Surrebutter explaining to client Crogate that he had lost the case but had thereby vindicated the rules of special pleading. See Hayes, *Crogate's Case*, 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 417 (1926).

One of the best parts of the book is the chapter headed "The Man Who Talks So Much," which relates various aspects of the judicial function, such as the writing of opinions and the behavior of the Justice during oral argument. His sharp interrogation of counsel and his insistence on the regularity of procedure are reminiscent of the *dramatis personae* of the Year Books such as Judges Bereford, Stonore, Hervey, *et al.*, whose verbal exchanges with counsel over the metaphysics of procedure were sometimes more amusing than enlightening.

Perhaps because the author is not formally trained in the law, discussion of the Justice's opinions in various highly technical legal fields have been omitted. In these, whether writing for the majority or dissenting, the Justice has seemed more often than not to have given the correct decision. Whether one agrees or disagrees with his judicial views, however, it would be unfair to deny that he has proven worthy of the appellation "Scholar on the Bench." One puts down this book with the feeling that a greater understanding has been obtained of one of the most brilliant and complex personalities of our time.

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